



Tribunal Pénal International pour le Rwanda  
International Criminal Tribunal for Rwanda

63/H

ICTR-98-44D-AR7bis  
9<sup>th</sup> February 2010  
{63/H – 57/H}

IN THE APPEALS CHAMBER

**Before:** Judge Patrick Robinson, Presiding  
Judge Fausto Pocar  
Judge Liu Daqun  
Judge Andréia Vaz  
Judge Carmel Agius

**Registrar:** Mr. Adama Dieng

**Decision of:** 9 February 2010

**CALLIXTE NZABONIMANA**

v.

**THE PROSECUTOR**

*Case No. ICTR-98-44D-AR7bis*

**DECISION ON CALLIXTE NZABONIMANA'S MOTION FOR LEAVE TO  
APPEAL AN ALLEGED *ULTRA VIRES* REFERRAL TO THE PRESIDENT**

**Counsel for the Defence:**  
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Ndeye Marie Ka  
Mary Diana Karanja

ICTR Appeals Chamber  
Date: 9<sup>th</sup> February 2010  
Action: R. Juma  
Copied To: Concerned Judges, Parties,  
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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
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NAME / NOM: ROSETTE MUZIGO-MARRISTO  
SIGNATURE: DATE: 10/02/10

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 (“Appeals Chamber” and “Tribunal”, respectively), is seized of “Nzabonimana’s Motion for Leave to Appeal an *Ultra Vires* Referral to the President in the Form of an Interoffice Memo from a Legal Officer, Trial Chamber III, Dated 18 November 2009”, filed by Counsel for Callixte Nzabonimana (“Nzabonimana”) on 2 December 2009 (“Motion”).

#### A. Background

2. From January 2009, Nzabonimana has sought, both directly and through the Registry, and later through the Pre-Trial Chamber and Trial Chamber III of the Tribunal (“Trial Chamber”), the assistance of French authorities in obtaining information which in his view may be relevant to preparing his defence of alibi.<sup>1</sup> In this context, the Tribunal addressed two judicial requests for cooperation to the French Government, pursuant to Article 28 of the Statute.<sup>2</sup> In response, the French authorities have confirmed their commitment to comply with the obligation to cooperate with the Tribunal and provided certain information.<sup>3</sup>

<sup>1</sup> In response to the first request for assistance presented by Nzabonimana, the French Authorities provided the Registrar with copies of the excerpts of three diplomatic telegrams dated 7, 9 and 11 April 1994, listing persons taking refuge at the French Embassy in Kigali. See *Télocopie de M. Jacques Champagne de Labriolle, Ambassadeur de France en Tanzanie, adressée à M. Adama Dieng, Greffier du Tribunal pénal international pour le Rwanda, Objet : Affaire le Procureur contre Callixte Nzabonimana*, 29 January 2009, with Annexes. See also *Lettre de Maître Vincent Courcelle-Labrousse adressée à Monsieur Bernard Kouchner, ministre des Affaires étrangères, Affaire: Callixte Nzabonimana, Tribunal pénal international pour le Rwanda, Ref. 20080274-VCL/RC*, dated 4 May 2009 and *Note Verbale du Cabinet du Greffier du Tribunal pénal international pour le Rwanda adressée à l’Ambassade de France à Dar Es-Salaam, à l’attention de M. Jacques Champagne de Labriolle*, Ref. ICTR/IOR/ERSPS/05/09/111-RD, dated 7 May 2009, see Annex A to *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-I, Urgent Motion of Defendant Nzabonimana Requesting an Order Directed at France, 19 June 2009 (“Urgent Motion of 19 June 2009”).

<sup>2</sup> *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44-D-PT, *Décision sur la requête urgente de Callixte Nzabonimana demandant à la Chambre d’ordonner à la France coopération et assistance*, 2 July 2009, in which the Pre-Trial Chamber, disposing of the Urgent Motion of 19 June 2009, issued a decision requesting France to provide Nzabonimana with the assistance necessary to obtain information relevant to the preparation of his defence, as specified therein; *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44-D-T, *Decision on Nzabonimana’s Motion Asking the Chamber to Request the President to Report the Matter of France’s Refusal to Cooperate to the Security Council*, 19 October 2009 (“Decision of 19 October 2009”) in which the Trial Chamber, disposing of “Nzabonimana’s Motion Asking the Chamber to Request the President to Report the Matter of France’s Refusal to Cooperate to the Security Council”, filed on 1 October 2009, denied Nzabonimana’s request pursuant to Rule 7 bis, but requested the French Government to provide the information therein specified.

<sup>3</sup> See *Lettre de l’Ambassade de France en Tanzanie, N° 540/TPIR, adressée au Greffe du Tribunal pénal international pour le Rwanda*, dated 15 September 2009, Motion, Annex C; *Lettre de l’Ambassade de France en Tanzanie, N° 652/TPIR, adressée au Greffe du Tribunal pénal international pour le Rwanda*, 28 October 2009 (“28 October 2009 Response from the French Embassy in Tanzania”), Motion, Annex E.

3. On 2 November 2009, Nzabonimana filed a motion<sup>4</sup> in which he expressed dissatisfaction with the 28 October 2009 Response from the French Embassy in Tanzania,<sup>5</sup> and requested the Trial Chamber, *inter alia*, to request the President of the Tribunal to report the alleged failure of France to cooperate with the Tribunal to the United Nations Security Council (“Security Council”) pursuant to Rule 7 *bis* of the Rules of Procedure and Evidence of the Tribunal (“Rules”).<sup>6</sup>

4. In an oral decision pronounced on 9 November 2009, the Trial Chamber decided to bring the issue of French cooperation to the attention of the President of the Tribunal (“9 November 2009 Oral Decision”).<sup>7</sup> The Trial Chamber indicated that a written decision would follow.<sup>8</sup>

5. On 13 November 2009, the Trial Chamber issued its decision in writing.<sup>9</sup> The Trial Chamber noted that while there had been a positive evolution in the responses of the French authorities, the 28 October 2009 Response from the French Embassy in Tanzania did not adequately respond to the questions posed by the Trial Chamber.<sup>10</sup> The Trial Chamber concluded that “it has exhausted its powers in seeking the information requested” and would therefore ‘refer’ the matter to the President of the Tribunal.<sup>11</sup> Accordingly, the Trial Chamber partly granted the 2 November 2009 Motion and “refer[red] the matter of French cooperation with the Tribunal to the President, pursuant to Rule 54 [of the Rules]”.<sup>12</sup>

<sup>4</sup> *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44-D, 1. Nzabonimana’s Motion for Stay of Proceedings and for Asking the Chamber to Request the President to Report the Matter of France’s Refusal to Cooperate to the Security Council; 2. Motion for Reconsideration, and/or Certification of Decision Rendered on 29 October 2009 for an Order Concerning Disclosure of Gacaca and Judicial Material Relating to Prosecution Witnesses; and 3. Motion for Reconsideration, and/or Certification of the Decision Rendered on 30 October on Nzabonimana’s Motion for the Postponement of the Start of Trial, 2 November 2009 (“2 November 2009 Motion”).

<sup>5</sup> 2 November 2009 Motion, paras. 26-41. In particular, Nzabonimana submits that, whereas the 19 October 2009 Decision requested France to provide the Registrar with a copy of the list of personnel working at the French Embassy in Kigali, in its response, dated 28 October 2009, French authorities referred to the list of officially accredited personnel at the Embassy.

<sup>6</sup> 2 November 2009 Motion, para. 41 and prayer. Nzabonimana also requested the Trial Chamber to stay the proceedings until the resolution, *inter alia*, of the matter of France’s alleged refusal of cooperation with the Trial Chamber. He also sought reconsideration of and/or certification to appeal the Decisions of 29 October 2009 and of 30 October 2009. In the latter decision the Trial Chamber dismissed his motion, filed on 14 October 2009, requesting the postponement of the trial based, *inter alia*, on France’s alleged failure to cooperate with the Tribunal. See *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Defence Motion for the Postponement of the Start of Trial, 30 October 2009; *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44-D-T, *Requête de la Défense aux fins de report de l’ouverture du procès de Callixte Nzabonimana*, 14 October 2009.

<sup>7</sup> T. 9 November 2009, p. 8: “The Chamber has considered subsequent communication from the French authorities in response to its decision and it is its considered opinion that they do not compel the Trial Chamber to rule otherwise. The Trial Chamber will however bring this issue to the attention of the President of the Tribunal.”

<sup>8</sup> T. 9 November 2009, p. 8.

<sup>9</sup> *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Nzabonimana’s Motion for Stay of Proceedings; Reconsideration and/or Certification of Decision Rendered on 29 October 2009; and Reconsideration and/or Certification of the Decision Rendered on 30 October 2009, 13 November 2009 (“13 November 2009 Decision”).

<sup>10</sup> 13 November 2009 Decision, para. 39.

<sup>11</sup> 13 November 2009 Decision, para. 40.

<sup>12</sup> 13 November 2009 Decision, p. 15. The Trial Chamber denied the related request for a stay of proceedings, in accordance with the 9 November 2009 Oral Decision. See *ibidem*.

6. On 17 November 2009, Nzabonimana filed a motion requesting to be allowed to present submissions on France's alleged refusal to cooperate with the Tribunal before the President of the Tribunal and the Security Council.<sup>13</sup> Nzabonimana also sought clarification of the 13 November 2009 Decision as to "whether the decision to refer the matter of French cooperation to the President was issued under Rule 7bis(A) or Rule 54, and [...] whether the matter is referred to the President so that he himself reports that matter to the United Nations Security Council".<sup>14</sup>

7. On 18 November 2009, a Legal Officer of the Trial Chamber addressed an Interoffice Memorandum to the President notifying him, with a specific reference to the 13 November 2009 Decision, that the Trial Chamber has decided to refer the matter of France's cooperation to him ("Interoffice Memorandum").<sup>15</sup>

8. On 2 December 2009, the Trial Chamber denied the 17 November 2009 Motion.<sup>16</sup> In responding to the request for clarification of the 13 November 2009 Decision, the Trial Chamber cited the disposition of the 13 November 2009 Decision<sup>17</sup> and referred to the Interoffice Memorandum.<sup>18</sup>

9. Nzabonimana filed the present Motion on 2 December 2009. The Prosecution responded on 7 December 2009,<sup>19</sup> and Nzabonimana replied on 15 December 2009.<sup>20</sup>

10. On 3 February 2010, the President of the Tribunal issued a decision holding that "in the absence of a formal request by the Trial Chamber under Rule 7 bis, he has no authority under the

<sup>13</sup> *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44-D, Motion Requesting the Chamber to Allow Nzabonimana to Present Submissions to the President of the ICTR and the Security Council on the Matter of France's Refusal to Cooperate with the ICTR and to Clarify the Decision of 13 November 2009, 17 November 2009 ("17 November 2009 Motion").

<sup>14</sup> 17 November 2009 Motion, para. 24.

<sup>15</sup> Interoffice Memorandum, Re: *Nzabonimana*: Referral to the President of the Tribunal of the matter of French cooperation pursuant to Rule 54 of the Rules, dated 18 November 2009 and Annex: "Summary of the Procedural History", Motion, Annex A.

<sup>16</sup> *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on the Defence Motion Requesting the Chamber to Allow Nzabonimana to Present Submissions to the President of the ICTR and the Security Council on the Matter of France's Refusal to Cooperate with the ICTR and to Clarify the Decision of 13 November 2009, 2 December 2009 ("2 December 2009 Decision").

<sup>17</sup> 2 December 2009 Decision, para. 9. *See supra*, para. 4.

<sup>18</sup> 2 December 2009 Decision, para. 4. The Trial Chamber referred to the excerpt of the Interoffice Memorandum stating that the Trial Chamber "considers a Rule 7 bis recommendation to be an extraordinary measure" and that "the Trial Chamber had decided to refer the matter to you for your consideration while leaving the remedy at your discretion," *see* fn. 13.

<sup>19</sup> Prosecutor's Response to Nzabonimana's Motion for Leave to Appeal an *Ultra Vires* Referral, to the President in the Form of an Interoffice Memo from a Legal Officer, Trial Chamber III Dated 18 November 2009, 7 December 2009 ("Prosecution's Response").

<sup>20</sup> Nzabonimana's Reply to Prosecutor's Response to the Motion for Leave to Appeal an *Ultra Vires* Referral to the President in the Form of an Interoffice Memo from a Legal Officer, Trial Chamber III, Dated 18 November 2009, 15 December 2009 ("Nzabonimana's Reply").

Rules to refer the matter of cooperation with France to the Security Council or to take other steps to address the matter”.<sup>21</sup>

## **B. Submissions**

11. Nzabonimana seeks leave to appeal the referral of the cooperation issue to the President through the Interoffice Memorandum.<sup>22</sup> He contends that the Interoffice Memorandum constitutes an *ultra vires* delegation of the Trial Chamber’s power because judicial decisions must be made by Judges of a Chamber and cannot be deferred to Legal Officers.<sup>23</sup> Nzabonimana further submits that the “use of this *ultra vires* mechanism to effectuate Article 28 – when Rule 7 *bis* is exhaustive on the issue is erroneous in law and prejudices Mr. Nzabonimana’s right to prepare an adequate and *timely* defence”.<sup>24</sup>

12. Nzabonimana submits that Rule 7 *bis* of the Rules does not allow a deferral to the President of the decision to refer to the Security Council a State’s failure to comply with an obligation under Article 28 of the Statute, because the President, according to the Rule and the relevant jurisprudence,<sup>25</sup> can only transmit to the Security Council the judicial finding of non-cooperation, which rests exclusively with the Trial Chamber.<sup>26</sup> Nzabonimana, recalling the importance of the information and documents sought from the French authorities to prove his alibi, argues that the Interoffice Memorandum, erroneously relying on Rule 54, causes prejudice to his right to prepare his defence, as it delays the proper reporting of this matter to the Security Council under Rule 7 *bis*.<sup>27</sup>

13. Nzabonimana contends that the Appeals Chamber has inherent jurisdiction to allow a party to appeal even in the absence of a rule providing for such an appeal.<sup>28</sup> He submits that the

<sup>21</sup> *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D, Decision on Referral by Trial Chamber of the Matter of French Cooperation with the Tribunal to the President Pursuant to Rule 54 (*Rule 7 Bis of the Rules of Procedure and Evidence*), 3 February 2010 (“Decision of the President of the Tribunal”), p. 5.

<sup>22</sup> Motion, para. 1 and pp. 10, 11. Nzabonimana also requests the Trial Chamber to allow him “to file an appeal brief containing detailed arguments in support of the issues of appeal summarised in the present application” and to determine the procedure applicable to the appeal. *See* Motion, pp. 10, 11.

<sup>23</sup> Motion, para. 12; Nzabonimana’s Reply, para. 5.

<sup>24</sup> Motion, para. 1.

<sup>25</sup> Motion, para. 12, *citing Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR108*bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 37, which states that: “It should be added that, apart from the cases provided for in Rule 7 *bis* (B), the President of the International Tribunal simply has the role of *nuncius*, that is to say, he or she shall simply transmit to the Security Council the judicial finding of the relevant Judge or Chamber”.

<sup>26</sup> Motion, paras. 12, 19, 20.

<sup>27</sup> Motion, paras. 16, 17, 30.

<sup>28</sup> Motion, para. 13, *referring to Prosecutor v. André Ntagerura*, Case No. ICTR-99-46-A28, Decision on Motion of André Ntagerura for Cooperation with Canada and for Reporting to the Security Council, 31 March 2008, para. 12. The Appeals Chamber notes that Nzabonimana has cited an incorrect reference. It will consider that he intended to refer to *In Re. André Ntagerura*, ICTR-99-46-A28, Decision on Motion for Leave to Appeal the President’s Decision of 31

Interoffice Memorandum is not a decision to which the relevant provisions on interlocutory appeals would apply and that “[t]he Rules do not envisage a procedure for appealing a memorandum from non-judicial officers purporting to contain substantial orders of the Chamber”.<sup>29</sup> Consequently, arguing that the inability to appeal the Interoffice Memorandum would deprive him of his due process rights, Nzabonimana submits that “[t]he inherent jurisdiction of the Appeals Chamber is the only effective remedy [against] the impugned Interoffice Memo.”<sup>30</sup>

14. The Prosecution responds that the matter is not properly before the Appeals Chamber and should be dismissed.<sup>31</sup> It contends that the Defence’s “allegation” that the Interoffice Memorandum constitutes a delegation of the Trial Chamber’s judicial power is a “gross misstatement”.<sup>32</sup> The Prosecution submits that the Trial Chamber, by its 13 November 2009 Decision, denied the requested remedy under Rule 7 *bis* and offered an “alternative administrative remedy under general provision Rule 54”.<sup>33</sup> According to the Prosecution, the “Interoffice Memorandum is simply an administrative procedure by the Chamber’s Legal Officer in fulfilling her role of providing legal, drafting and administrative support to the Judges.”<sup>34</sup> The Prosecution argues that, if Nzabonimana wished to contest the Trial Chamber’s conclusion in disposing of his request pursuant to Rule 7 *bis*, he should have requested certification to appeal the decision which denied the requested remedy.<sup>35</sup>

15. Finally, the Prosecution requests the Appeals Chamber to sanction the Defence Counsel by an order for non-payment of fees associated with the Motion, for his misleading and erroneous attempt to portray the Interoffice Memorandum as an usurpation of the Trial Chamber’s power.<sup>36</sup>

16. In reply, the Appellant contends that the Interoffice Memorandum is not an administrative document.<sup>37</sup>

### C. Discussion

17. The Appeals Chamber notes Nzabonimana’s contention that the Trial Chamber erred in relying, in its 13 November 2009 Decision, on Rule 54 of the Rules instead of Rule 7 *bis* of the

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March 2008 and the Decision of Trial Chamber III Rendered on 15 May 2008, 11 September 2008 (“*Ntagerura Decision*”), para. 12.

<sup>29</sup> Motion, para. 11.

<sup>30</sup> Motion, para. 13.

<sup>31</sup> Prosecution’s Response, p. 2.

<sup>32</sup> Prosecution’s Response, para. 25. *See also* Prosecution’s Response, para. 24.

<sup>33</sup> Prosecution’s Response, para. 28. *See also* Prosecution’s Response, para. 27.

<sup>34</sup> Prosecution’s Response, para. 28, *referring to* Article 8(3) B of the Directive for the Registry of the International Criminal Tribunal for Rwanda.

<sup>35</sup> Prosecution’s Response, para. 31.

<sup>36</sup> Prosecution’s Response, para. 30 and p. 12.

<sup>37</sup> Nzabonimana’s Reply, para. 5.

Rules for the referral to the President of the Tribunal of the matter of French cooperation. The Appeals Chamber will not consider this issue because Nzabonimana did not seek certification to appeal the decision in accordance with Rule 73 of the Rules and, as such, this matter is not properly before the Appeals Chamber.

18. Turning to Nzabonimana's request for leave to appeal the Interoffice Memorandum, the Appeals Chamber finds that the Interoffice Memorandum is no more than a notification to the President of the Tribunal of the 9 November 2009 Oral Decision and the 13 November 2009 Decision, which the Decision of the President of the Tribunal refers to. Furthermore, the Appeals Chamber considers that the exercise of its inherent jurisdiction is not warranted in the circumstances of this case.

19. With regard to the Prosecution's request for sanctions against the Defence Counsel pursuant to Rule 73(F) of the Rules, the Appeals Chamber recalls that it has consistently held that the power to impose sanctions should be exercised cautiously.<sup>38</sup> The Appeals Chamber, considering the circumstances of the case, does not consider that the Motion is frivolous or an abuse of process. The Appeals Chamber, therefore, does not consider that the imposition of sanctions is warranted.

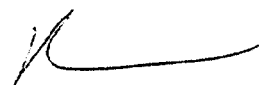

#### **D. Disposition**

20. For the foregoing reasons, the Appeals Chamber

**DISMISSES** the Motion; and

**DENIES** the Prosecution's request to sanction the Defence Counsel.

Done this 9<sup>th</sup> day of February 2010,  
at The Hague, The Netherlands.

  
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Judge Patrick Robinson  
Presiding  


<sup>38</sup> *The Prosecutor v. Gaspard Kanyurukiga*, Case No. ICTR-2002-78-R11bis, Decision on Request to Admit Additional Evidence of 1 August 2008, 1 September 2008, para. 12.